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# Negligence Claims Between Parent and Child

Carl W. Turner  
*University of Kentucky*

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## Recent Cases

NEGLIGENCE CLAIMS BETWEEN PARENT AND CHILD—Two recent decisions have committed Kentucky to the general rule that prohibits tort actions based on negligence between parents and their minor children. In one, a woman sued her seventeen year old son for injuries sustained by reason of the alleged negligent operation of an automobile. The plaintiff sought to establish the emancipation of the child, tacitly conceding the immunity of the child if not emancipated. The evidence was insufficient to show emancipation, which would have brought the case within an acknowledged exception to the general rule,<sup>1</sup> and the Court of Appeals affirmed the directed verdict of the trial court for the defendant. *Thompson v. Thompson*, 264 S.W. 2d 667 (Ky. 1954).

The converse of this problem was an action by the personal representative of a deceased child against the child's father for wrongful death caused by the alleged negligent operation of the defendant's family purpose automobile by the defendant's minor son. According to the court's view of the constitutional<sup>2</sup> and statutory<sup>3</sup> provisions for wrongful death claims, the problem presented was whether or not an unemancipated minor could maintain an action of negligence against its parent.<sup>4</sup> The court held that the action could not be maintained, stating: "We are of the opinion that a general public policy, in the absence of legislation changing it, justifies denial of the right of a minor child to sue its parent for such a tort." *Harralson v. Thomas*, 269 S.W. 2d 276, 277 (Ky. 1954).

The *Thompson* case presented the parent against minor child problem to the Kentucky Court of Appeals for the first time. The situation in the *Harralson* case had been before the Court once before in *Hale v. Hale*,<sup>5</sup> and in the latter case the representative of the child's estate was permitted to recover from the child's parent. The opinion in the *Harralson* case acknowledged the result reached by *Hale v. Hale*, but treated the controversy in the *Harralson* case as one of first impression saying that the issue of child against parent was not discussed or decided in that opinion. This seems to be a questionable conclusion in view of the language of the court in the *Hale* case.<sup>6</sup>

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<sup>1</sup> PROSSER, TORTS 907 (1941).

<sup>2</sup> KY. CONST. sec. 241.

<sup>3</sup> KY. REV. STAT. sec. 411.130 (1953).

<sup>4</sup> It is not within the scope of this writing to discuss the view of the court with respect to the wrongful death provision.

<sup>5</sup> 312 Ky. 867, 230 S.W. 2d 610 (1950); Note, 39 Ky. L.J. 479. (1951).

<sup>6</sup> *Id.* at 869, 230 S.W. 2d at 612: "It is urged here by appellee that the common law disability of one spouse to sue the other, or of a parent to sue a child, or

Speaking only of negligence actions between parent and child, the principal cases are undoubtedly in accord with the general rule in the United States.<sup>7</sup> The origin of the doctrine in this country has been traced to an obscure Mississippi case;<sup>8</sup> unquestioned acceptance by other courts would be difficult to explain. The reasons given by the courts for denying recovery by a child against its parent are for the most part the same as those given when the converse situation is before the court.<sup>9</sup> If a jurisdiction decides that the parent is immune from suit by his minor child then it will ordinarily follow that the child is immune from suit by the parent, since the courts usually make no efforts to distinguish the situations.

A variety of reasons are given in support of the rule.<sup>10</sup> Some appear

vice versa, for tort should be applied." The court then quotes from *Robinson's Adm'r v. Robinson*, 188 Ky. 49, 220 S.W. 1075 (1920), which held that the administrator of a deceased wife could maintain an action against her husband for the wrongful death of the wife at the hands of the husband where the wife was survived by children in addition to the husband: "It is expressly provided by the Constitution that the action may be maintained in every such case by the administrator of the decedent, and for the benefit of those named in the statute. Manifestly no rule of the common law nor any limitations found in the married woman's act enacted in the exercise of a general legislative authority can possibly have the effect of defeating or abridging such an explicit and mandatory provision of the Constitution and a legislative enactment in compliance therewith." The court in the *Hale* case then continued: "The reasoning therein is equally applicable to the case of Carol Lynn Hale [the deceased minor child] where an administrator of a deceased child sues for wrongful death. . . ."

<sup>7</sup> Parent against child: *Shaker v. Shaker*, 129 Conn. 518, 29 A. 2d 765 (1942); *Oliveria v. Oliveria*, 305 Mass. 297, 25 N.E. 2d 766 (1940); *Rines v. Rines*, 97 N.H. 55, 80 A. 2d 497 (1951); *Detwiler v. Detwiler*, 162 Pa. Sup. 383, 57 A. 2d 426 (1948); *Silverstein v. Kastner*, 342 Pa. 207, 20 A. 2d 205 (1941). Child against parent: *Rambo v. Rambo*, 195 Ark. 832, 114 S.W. 2d 468 (1938); *Luster v. Luster*, 299 Mass. 480, 13 N.E. 2d 438 (1938); *Baker v. Baker*, 263 S.W. 2d 29 (Mo. 1953); *Levesque v. Levesque*, 106 A. 2d 563 (N.H. 1954); *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E. 2d 236 (1942); *Redding v. Redding*, 235 N.C. 638, 70 S.E. 2d 676 (1952); *Ownby v. Kleyhammer*, 194 Tenn. 109, 250 S.W. 2d 37 (1952); *Brumfield v. Brumfield*, 194 Va. 577, 74 S.E. 2d 170 (1953); *Ball v. Ball*, 269 P. 2d 302 (Wyo. 1954); *Villaret v. Villaret*, 169 F. 2d 677 (D.C. Cir. 1948).

<sup>8</sup> *Hewelle v. George*, 68 Miss. 703, 9 So. 885 (1891). The defendant's minor daughter sought damages for false imprisonment. The court decided that the action could not be maintained saying: "The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." The Mississippi Court did not cite authority for the position that it took in this case. *McKelvey v. McKelvey*, 111 Tenn. (3 Cates) 388, 77 S.W. 664 (1903) is the next case on the subject of a minor child suing a parent for a tort. Holding for the defendant the court cites the *Hewelle* case and refers to the immunity of the parent as a common law rule. It is doubtful that there was such a common law rule: see *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 906 (1930). *POLLOCK, LAW OF TORTS* 150 (New American—From Third English Edition 1894), in speaking of the authority of parents to administer summary punishment says: "And such persons are protected in exercise thereof, if they act in good faith and in a reasonable and moderate manner." There is no indication from this passage of a common law rule of immunity of a parent from suit for tort by an injured child.

<sup>9</sup> *Rines v. Rines*, *supra* note 7, 80 A. 2d at 498; *Silverstein v. Kastner*, *supra* note 7; *Turner v. Carter*, 169 Tenn. (5 Beeler) 553, 89 S.W. 2d 751 (1936).

<sup>10</sup> See *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

contradictory,<sup>11</sup> and only a few merit comment. They are: (1) The rule is based on a sound public policy that seeks to preserve domestic tranquility;<sup>12</sup> (2) Such suits tend to undermine parental authority and discipline;<sup>13</sup> (3) There is an analogy to suits between husband and wife;<sup>14</sup> (4) A parent, since he is charged with the protection of the child's interests, cannot occupy this protective position and that of claimant against the child at the same time.<sup>15</sup>

The argument that tort actions between parent and child should be prohibited in order to preserve domestic peace and tranquility is the one most often stated. If the peace of the home has not been disturbed before the action is brought, it is unlikely that it will be shattered by a lawsuit.<sup>16</sup> When the defendant is protected by liability insurance, it could seldom be argued that to permit the claim would result in the destruction of family peace. The best answer to this argument is found in the decisions of the courts themselves in permitting the enforcement of property rights between parent and child.<sup>17</sup> If the family tranquility argument is not sufficient where property rights are involved, it should not stand in the way where the claim relates to personal injuries.

Probably the most valid reason given in support of the rule against a suit by a child is that the action may undermine parental control and discipline. But an action to redress an injury resulting from an act not involving parental control can hardly be said to be an undermining factor where the act complained of was not one committed while in the exercise of such control. Furthermore, there should be no reluctance to distinguish among claims based on different types of wrongful conduct by the parent in the exercise of parental control. It has been said that there is no practical line of demarcation which may be drawn between actions based on heinous crimes and actions for any other tort.<sup>18</sup> This is not a convincing argument when it is remem-

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<sup>11</sup> It is said that claims between members of a family will disrupt domestic tranquility, and that there would be danger of fraud. It seems doubtful that a claim which is fraudulent because of collusion between the members of the family would also be disruptive of domestic tranquility.

<sup>12</sup> *Hewelle v. George*, *supra* note 8, 90 So. at 887; *Silverstein v. Kastner*, *supra* note 7; *Shaker v. Shaker*, *supra* note 7, 29 A. 2d at 767.

<sup>13</sup> *Matarese v. Matarese*, 47 R.I. 131, 131 A. 198, 199 (1925); *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

<sup>14</sup> *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905); *Prosser, op. cit. supra* note 1 at 906.

<sup>15</sup> *Shaker v. Shaker*, *supra* note 7, 29 A. 2d at 767; *Schneider v. Schneider*, 160 Md. 18, 152 A. 498, 499 (1930).

<sup>16</sup> See *Borst v. Borst*, 41 Wash. 2d 642, 251 P. 2d 149, 153 (1952).

<sup>17</sup> *O'Donnell v. O'Donnell*, 305 Ky. 60, 202 S.W. 2d 999 (1947); *McCurdy*, *supra* note 10, at 1057.

<sup>18</sup> *Roller v. Roller*, *supra* note 14, 79 P. at 789. (An extreme case denying the claim of a child who was raped by her father.)

bered that courts must make fine distinctions every day. In the reverse situation, a suit by a parent against the child seems even less likely to undermine parental authority.

The analogy to the immunity of a husband or a wife from suit by the other is invalid to the extent that there is no conception of legal identity between a parent and minor child.<sup>19</sup> There is, however, similarity between the two situations to the extent that the courts give the same reasons for denial of a claim between husband and wife that are given in claims between parent and child. Courts in the parent against child cases, as well as in controversies between husband and wife, have asserted that the claims should be denied in order to preserve domestic peace and tranquility. For example, the Court of Appeals in *Broadbush v. Wilkenson*<sup>20</sup> stated as dictum that actions between husband and wife could not be maintained since they were against a public policy which sought to preserve domestic peace and felicity. In the principal case of *Harralson v. Thomas* the court said that it was unwilling to abandon the principles supporting the general rule. It may be assumed that one of the principles referred to was the interest of society in preserving domestic tranquility.

It is very interesting to note that the Kentucky court has recently permitted a wife to maintain a tort action against her husband.<sup>21</sup> The opinion in the *Harralson* case attributed the result reached in the action between husband and wife to the Married Woman's Property Act.<sup>22</sup> It is believed that the statute affords a slim basis for distinguishing the cases. If the passage of the Married Woman's Property Act indicated that the public policy argument supporting the rule in the husband and wife cases should be disregarded, a similar result should be reached in cases involving parent and child.

The argument that it is inconsistent for the parent to occupy the position of protector of his child's interest and be a claimant against him seems to be the only attempt to distinguish the claim by a parent against his child from that of the child against its parent. This is another reason evidently deemed insufficient in claims involving property. The question should be asked: Why is it applicable in one case and not the other? No answer is apparent.

Dissatisfied courts have found at least three ways to evade the general rule. The cases may be classified as follows: (1) Cases where the acts of the defendant were said to constitute wilful misconduct or

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<sup>19</sup> McCurdy, *supra* note 10, at 1074.

<sup>20</sup> 281 Ky. 601, 136 S.W. 2d 1952 (1940).

<sup>21</sup> *Brown v. Gosser*, 262 S.W. 2d 480 (Ky. 1953); 42 Ky. L.J. 497 (1954).

<sup>22</sup> KY. REV. STAT. sec. 404.020 (1953).

wantonness;<sup>23</sup> (2) Several cases which have allowed recovery where the defendant was engaged in his vocational capacity;<sup>24</sup> (3) At least one case where the court has relied on a master and servant relationship between father and son plus the presence of workmen's compensation insurance.<sup>25</sup>

The common factor in cases where recovery has been permitted is liability insurance. Apparently the presence of liability insurance without one of the additional factors listed has never been sufficient to abrogate the general rule, although the language of at least two courts, New Hampshire and West Virginia, seemed strong enough to indicate that liability could be premised on insurance alone.<sup>26</sup> However, a subsequent decision by the New Hampshire court adhered to the general rule in a case involving the negligent operation of an automobile by an insured parent.<sup>27</sup> A similar case has not come before the West Virginia court since its previous decision.

The argument that liability insurance should change the general rule is that its existence, since it relieves the defendant from ultimate responsibility, will answer the public policy argument because family harmony will not be disturbed when financial responsibility is placed on the insurer. In reply the courts have said: (1) The existence of liability insurance should not create a right of action where none would otherwise exist;<sup>28</sup> (2) There would be danger of collusion;<sup>29</sup> (3) The action might still produce the family disturbance that the general rule seeks to prevent, since most insurance policies require the cooperation of the insured in the defense of any claim;<sup>30</sup> (4) Not every child or parent would be insured, and it would be hardly feasible to make a rule of public policy depend on the question of whether the defendant is insured.<sup>31</sup>

The first of these arguments is of course true in a narrow sense, but the essential fact which establishes the liability of the defendant is that he has provided for satisfaction of the judgment in a manner which removes the main objection to the maintenance of the claim.

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<sup>23</sup> *Wright v. Wright*, 85 Ga. App. 721, 70 S.E. 2d 152 (1952); *Cowgill v. Boock*, 189 Ore. 282, 218 P. 2d 445 (1950).

<sup>24</sup> *Worrell v. Worrell*, 174 Va. 11, 4 S.E. 2d 343 (1939); *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538 (1932). (In both cases the father was the owner of the bus in which the plaintiff child was riding when injured).

<sup>25</sup> *Dunlap v. Dunlap*, *supra* note 7 (Son was injured while employed by father, a contractor and builder).

<sup>26</sup> *Id.*, 150 A. at 915; *Lusk v. Lusk*, *supra* note 24, 166 S.E. at 539.

<sup>27</sup> *Levesque v. Levesque*, *supra* note 7.

<sup>28</sup> *Shaker v. Shaker*, *supra* note 7, 29 A. 2d at 767; *Villaret v. Villaret*, *supra* note 7, at 678; *Levesque v. Levesque*, *supra* note 7, at 564.

<sup>29</sup> *Villaret v. Villaret*, *supra* note 7, at 679.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Shaker v. Shaker*, *supra* note 7, 29 A. 2d at 767.

Satisfaction of a judgment by a third party simply would not in fact disturb the peace and harmony of the home. The second and third reasons are contradictory and an admission of either as a general principle would be to deny the other. The danger of collusion is a common argument used by courts when reasonable arguments are not available. Cooperation by the insured with the insurer in defense of a claim assumes what in fact would not be true in that the insured would not, as a practical matter, begrudge a member of his family compensation for his injuries. Cooperation need not go that far. In answer to the fourth argument it is not apparent why liability should not turn on the presence of insurance if it be decided that the general rule is the best one in cases where the defendant is not insured. Public policy is dependent on existing circumstances as well as other reasons that support rules of law.

Cooley, about sixty six years ago, had this to say about the immunity of parents to tort actions by their children: "In principle there seems to be no reason why such an action should not be sustained . . . ." <sup>32</sup> Prosser, speaking of torts in the family, states: "Few topics in the law of torts, in view of modern economic, social, and legislative changes, display in their treatment greater inconsistency and more unsatisfactory reasoning." <sup>33</sup>

In the absence of legal principle are the reasons in support of the general rule sufficient? The abundance of reasoning which denies the rule is as great as that which upholds it. The pervasiveness of the general rule has been sharply diminished by cases which seize on some factor to escape its harshness. <sup>34</sup> The next logical step would be to permit an injured child or parent to recover for injuries sustained from the negligent operation of an automobile where the defendant is insured. It is to be regretted that Kentucky did not lead the way when the opportunity presented itself to allow suits between parent and child as it did in a suit between husband and wife. The absence of a statute to be construed is a slender basis for the distinction.

CARL W. TURNER

LABOR LAW—EXCLUSIVE POWER OF THE NLRB AGAINST POWER OF STATE COURT TO ENJOIN ACTIVITY VIOLATING STATE LAW—The defendant union called a strike against the American Suppliers, Inc. and placed picket lines around its establishments. One of the establishments was a "stemmery" situated on ground owned by the American Tobacco

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<sup>32</sup> COOLEY, LAW OF TORTS 197 (2d ed. 1888).

<sup>33</sup> *Supra* note 1, at 897.

<sup>34</sup> *Supra* notes 24, 25, and 26.